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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD REYNOLDS,

Defendant and Appellant.

F074470

(Super. Ct. No. F15904285)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Denise Lee Whitehead, Judge.

Gordon B. Scott, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the State Attorney General, Sacramento, California, for Plaintiff and Respondent.

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* Before Levy, Acting P.J., Peña, J. and Smith, J.

INTRODUCTION

Appellant Richard Reynolds was convicted by a jury of violating Penal Code¹ sections 459 and 460, subdivision (a), first degree burglary. In a court trial, it was found true that Reynolds had suffered a serious felony conviction pursuant to section 667, subdivision (a)(1); one prison prior pursuant to section 667.5, subdivision (b); and five prior strike convictions pursuant to section 667, subdivisions (b)-(i) and section 1170.12, subdivisions (a)-(d). A determinate term of five years, followed by an indeterminate term of 25 years to life was imposed.

Reynolds appealed his convictions and counsel filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436. Subsequently, Senate Bill No. 1393 was signed and became effective on January 1, 2019, effectively granting the trial court discretion to strike section 667, subdivision (a) enhancements. (Stats. 2018, ch. 1013, §§ 1-2; *People v. Garcia* (2018) 28 Cal.App.5th 961, 971-972.) We will remand the matter for the limited purpose of allowing the trial court to consider exercising its discretion to strike the section 667, subdivision (a) enhancement.

FACTUAL AND PROCEDURAL SUMMARY

An information was filed on July 24, 2015, alleging that on January 14, 2015, Reynolds violated section 459. The information alleged five serious felony convictions pursuant to section 667, subdivision (a)(1); 11 prison priors pursuant to section 667.5, subdivision (b); and five prior strike convictions pursuant to section 667, subdivisions (b)-(i) and section 1170.12, subdivisions (a)-(d). Each of the prior convictions had a conviction date of September 18, 2008.

Testimony at trial established that on the evening of January 14, 2015, Patricia Woodcock was not at her home on West San Ramon Avenue. She received a call from

¹ References to code sections are to the Penal Code unless otherwise specified.

the police about a burglary at her home and returned home about 9:30 p.m. When she arrived home, among the items missing were her new television and an envelope of money; she also found damage to a window and the door of the garage.

A neighbor of Woodcock's, Samuel Torres, who was a police officer, was returning home about 6:30 p.m. with his wife and child. As he approached his residence, he saw two African-American males heading west on San Ramon. Initially they were running but slowed to a walk when they saw Torres's car. Torres described one man as heavier and taller; the other was shorter and thinner.

There was a car parked in front of Torres's house that he did not recognize. Torres thought there was something suspicious about the two men because they stopped running when they saw his car. He wrote down the license plate of the vehicle in front of his house and then went inside and watched.

Torres watched as the two men came back and went to the car in front of his house. They then crossed the street to Woodcock's house and rang the doorbell or knocked. It looked like a porch light came on and the men disappeared into the backyard of the house. Torres called 911 and described what he had just seen. He provided the license plate of the car in front of his house and described its make and model as a Dodge Charger.

Torres remained at his front window for approximately 30 minutes. He saw the two men appear again; one man was carrying a large television and the other man was carrying a couple of bags. At this point, they were wearing masks, but had not been wearing them when he first saw them. The men tried to put the television in the Dodge Charger, but it did not fit.

The men loaded the television into a different vehicle; Torres was unable to get a clear look at the other vehicle. Torres again called 911 and told the operator the men had left the house "with the TV's." Torres was concerned because he did not know if the

owners of the house were at home. Torres indicated there was a red Pontiac connected to the incident, possibly as a lookout. Torres watched as the men left and headed southbound toward Shaw.

Officers arrived about 30 minutes after the 911 call. While waiting for officers to arrive, Torres and another person in law enforcement entered the house through the open patio door to make sure no one was there.

Two officers arrived in response to the 911 call. Torres gave them the license number of the Dodge Charger and a description of the men he had seen. The officers were able to determine that people had entered Woodcock's home through a kitchen window in the backyard.

The officers checked the registration for the license number given to them by Torres. They went to the address but were unable to locate the Dodge Charger or the suspects.

The next day, Torres met with a detective, who showed him a six-pack lineup of pictures. Torres selected photograph No. 5 as showing one of the men possibly involved in the burglary and indicated he was "60 percent" certain of the identification. Torres suggested the detective speak with his wife, Christina Linares, who was present that evening. After the detective left, Torres called Linares to tell her the detective would be coming to their home to show her a lineup.

Linares testified she saw two African-American men. One was six feet tall or taller; the other was not over six feet tall. From the front of the house, Linares saw the men cross San Ramon to her neighbor's house. Linares went to her kitchen window and saw the men approach the front door, a motion sensor light came on, and the men disappeared around the side of the house.

Linares watched as the men came out from the side of the residence, one carrying a television and the other carrying a large black sack. One man put the bag into the Dodge Charger, but the other man could not get the television into the Dodge Charger.

When Linares was shown the photographic lineup, she was 90 to 100 percent sure she recognized the person in the No. 5 photo as one of the men involved in the burglary.

On January 21, 2015, Officer Anthony Alvarado was dispatched to an address on West Weldon regarding a possible fight. There was a group of people in the front yard and a Dodge Charger parked in the driveway. Based on the license plate of the Dodge Charger, Alvarado determined the vehicle was wanted in connection with a crime. Alvarado asked those gathered who owned the Dodge Charger; Reynolds identified himself as the owner. Alvarado placed Reynolds under arrest.

Jody Flores, an investigator with the district attorney's office, was assigned to conduct a follow-up investigation on the burglary. As part of his investigation, Flores located a Facebook account showing photographs of Reynolds posing with the Dodge Charger. Flores obtained a search warrant for the account; the photographs were uploaded to Facebook between March 26, 2013, and August 9, 2014. Reynolds's Facebook profile photograph was of the Dodge Charger with a person sitting in front of the car.

Flores interviewed Jonnia Draper, Reynolds's girlfriend. He also interviewed Torres.

At trial, Shandon Samuels testified that he was at Reynolds's home the evening of the burglary working on a car; Reynolds was there until 9:30 p.m. and never left during that time. Samuels testified the Dodge Charger was a car that Reynolds let other people drive; Reynolds drove an El Camino.

Draper testified that on the day of the burglary, Reynolds was driving an El Camino. The Dodge Charger was not at the house; she could not remember who had the

Dodge Charger. Draper claimed numerous people drove the Dodge Charger. Someone took the Dodge Charger the morning of the burglary; she did not know who took the vehicle. The day of the burglary, Draper claimed Reynolds arrived home about 5:30 p.m.

Alexis Claiborne testified that the Dodge Charger belonged to Draper but was not at Draper's residence the evening of the burglary. Claiborne was visiting Draper on January 14, 2015, and gave Draper a ride; when they returned to Draper's house around 7:00 p.m., Reynolds's El Camino was parked in the driveway.

Dr. Robert Shomer testified as an expert on eyewitness identification, memory, and perception. Shomer testified someone may be 50 percent sure of an identification initially, then become more sure over time as they become committed to their position. Shomer testified it would not be easy to identify an unknown person from 20 to 40 feet away on a foggy night.

On November 16, 2015, the jury found Reynolds guilty of the charged offense, first degree burglary.

Reynolds waived a jury trial on the prior conviction allegations. The trial court found true that Reynolds had committed five prior strike offenses; had one prior serious felony conviction under section 667, subdivision (a)(1); and one section 667.5, subdivision (b) prison prior.

In August 2016, Reynolds had new defense counsel and filed a motion for a new trial. The motion argued that the evidence was insufficient to sustain the conviction; the photographic lineup was suggestive; and trial counsel was ineffective. The motion also asserted that Woodcock's testimony created bias; inconsistent testimony meant that a prosecution witness had to have committed perjury; and the prosecution withheld potentially exculpatory evidence in violation of *Brady v. Maryland* (1963) 373 U.S. 83.

The trial court denied the motion. The trial court noted that it had reviewed the evidence and the trial transcript and found the evidence was sufficient to support the

conviction and demonstrated Reynolds was guilty beyond a reasonable doubt. The trial court also found there was no evidence adduced at trial to support the claim the photographic lineup was suggestive. Regarding the claim of inconsistent testimony, the trial court found the motion failed to cite to the record and the court's own review of testimony revealed only minor inconsistencies. The trial court found that the record did not disclose any ineffective assistance of counsel, only tactical decisions by trial counsel. The trial court found there were no comments made by Woodcock in her testimony that could have inflamed any bias against Reynolds. Finally, the trial court found the motion failed to specify what potentially exculpatory evidence had not been disclosed by the prosecution.

Reynolds was sentenced on October 3, 2016. The trial court noted that at the time of the current offense, Reynolds was on parole for five prior residential burglaries. The trial court struck the section 667.5, subdivision (b) enhancement; imposed a five-year term for the section 667, subdivision (a) enhancement; and a consecutive term of 25 years to life on the substantive offense. Credits of 622 actual days and 622 conduct days, for a total of 1,244 days, was awarded. The abstract of judgment accurately reflects the oral pronouncement of sentence.

A timely notice of appeal was filed on October 3, 2016.

DISCUSSION

Appellate counsel filed a *Wende* brief on August 10, 2018. That same day, this court issued its letter to Reynolds inviting him to submit supplemental briefing. Reynolds requested an extension of time to submit supplemental briefing, which was granted. On September 20, 2018, Reynolds filed a supplemental brief.

In his supplemental brief, Reynolds argues the prosecution failed to disclose exculpatory evidence; trial counsel rendered ineffective assistance; and in ruling on the motion for a new trial, the trial court relied on facts not in evidence.

As to the claim the prosecution withheld exculpatory evidence, set forth on pages 1 and 2 of his supplemental brief, Reynolds claims Torres conducted his own independent investigation of the incident, which was not disclosed to the defense. This misstates the record. An issue arose at trial as to whether Torres had conducted some sort of investigation, of which neither the prosecution nor the defense was aware. The trial court recessed until the following morning for the parties to discuss the matter. When the parties returned the following morning, an agreement on how to address the matter had been reached by the parties, which included questioning Torres on this matter. As the trial court found in ruling on the motion for a new trial, there was no exculpatory evidence that was withheld.

With respect to Reynolds's claim of ineffective assistance of counsel raised on pages 2 and 3 of his supplemental brief, we agree with the trial court that the record does not disclose ineffective assistance of counsel. (*People v. Jenkins* (2000) 22 Cal.4th 900, 952.) Any claim of ineffective assistance of counsel should be brought in a petition for writ of habeas corpus, not on direct appeal. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

Finally, on page 3 of his supplemental brief, Reynolds contends the trial court relied on facts not in evidence in denying his motion for a new trial. The statement Reynolds challenges is the comment from the trial court that Torres likely made a "mistake about what he remembered" with respect to a point where another witness's recollection differed. The trial court did not find that either witness was "lying as to this particular point." The trial court did not misstate the evidence or rely on facts not in evidence; the trial court was discussing a minor inconsistency between the testimony of two witnesses.

Essentially, Reynolds is asking this court to reevaluate the credibility of witnesses and the weight to be accorded evidence. An appellate court does not reweigh evidence or

reevaluate a witness's credibility; that is the province of the trier of fact. (*People v. Reed* (2018) 4 Cal.5th 989, 1006-1007; *People v. Williams* (2007) 156 Cal.App.4th 949, 961.)

Although we are affirming the judgment, we will remand the matter for the trial court to consider its discretion under Senate Bill No. 1393. On September 30, 2018, after briefing in this case, the Governor signed Senate Bill No. 1393. (Stats. 2018, ch. 1013, §§ 1-2.) Effective January 1, 2019, trial courts were granted discretion to strike section 667, subdivision (a) enhancements. (*People v. Garcia, supra*, 28 Cal.App.5th at pp. 971-972.)

Here, one such enhancement was imposed at Reynolds's sentencing. Senate Bill No. 1393 took effect before Reynolds's judgment became final and therefore, it applies to his case. (*People v. Vieira* (2005) 35 Cal.4th 264, 306; *In re Estrada* (1965) 63 Cal.2d 740, 744.) Although Reynolds received a lengthy sentence due to his five prior strike convictions and the trial court declined to dismiss those strikes, it did strike the section 667.5, subdivision (b) enhancement. Therefore, it is not clear from the record that the trial court would decline to exercise its new-found discretion to strike the section 667, subdivision (a) enhancement. (*People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110.) Consequently, the matter must be remanded for the trial court to consider exercising its discretion.²

DISPOSITION

This matter is remanded to the superior court for the limited purpose of allowing the court to exercise its discretion under Senate Bill No. 1393 (Stats. 2018, ch.1013, §§ 1-2). If the court strikes the Penal Code section 667, subdivision (a) enhancement, then the court shall resentence Reynolds accordingly and shall forward an amended abstract of judgment to the appropriate authorities. If the court declines to strike this

² We express no opinion on how the court should exercise its discretion on remand.

enhancement, Reynolds's previously imposed sentence shall remain in effect. In all other respects, the judgment is affirmed.